

REMARKS

The Remarks submitted with the Preliminary Amendment Accompanying Request for Continued Examination electronically filed on March 26, 2010, having not been identified as being non-compliant in the Notice of Non-Compliant Amendment, are considered to have been entered, and for the absence of doubt, are incorporated herein by reference. However, references to amended Claim 1 in the March 26, 2010 Remarks should be read as referring to the new claim 24 submitted herewith, as explained in greater detail below.

A Notice of Non-Compliant Amendment (“Notice”) was mailed to the Applicant’s undersigned representative on April 2, 2010, alleging that an amendment accompanying a Request for Continued Examination (“RCE”) submitted on March 26, 2010 was considered non-compliant because it failed to meet the requirements of 37 CFR 1.121 or 1.4. The Notice indicated that in order for the amendment to be compliant, claim 1 needed to be identified by the status identifier “Canceled” because “claim 1 was canceled in previous amendment.”

It is respectfully submitted that the Notice of Non-Compliant Amendment was improper, inasmuch as claim 1 was only indicated as canceled in an Amendment After Final submitted March 19, 2010, which was expressly not entered by the Examiner in the present application (see Advisory Action mailed March 25, 2010). The RCE form PTO/SB/30 submitted March 26, 2010 did not include a check in box 1a, but did include checks in boxes 1b and 1bi. Furthermore, the Remarks section of the March 26, 2010 Amendment Accompanying the RCE stated: “This Preliminary Amendment accompanies a Request for Continued Examination. **It is respectfully requested that the Amendment After Final submitted March 19, 2010 not be entered**, but rather, that the instant Preliminary Amendment be entered, which is in response to the final office action mailed October 28, 2009.” (March 26, 2010 Amendment Accompanying RCE, page 4)(Emphasis added).

The RCE form PTO/SB/30 states that “any previously filed unentered amendments and amendments enclosed with the RCE will be entered in the order in which they were filed **unless the applicant instructs otherwise**.” (Emphasis added). It is believed

that the statements in the Remarks section of the March 26, 2010 Amendment Accompanying the RCE were sufficient instructions from the applicant that the unentered Amendment After Final submitted March 19, 2010 not be entered. Therefore, Applicant respectfully submits that claim 1 was still a pending claim as of the submission of the March 26, 2010 amendment accompanying the RCE. Nevertheless, in the interests of advancing the prosecution of the present application, the Listing of Claims submitted with the present Amendment In Response To Notice Of Non-Compliant Amendment Under 37 CFR 1.121 represent the present form of the claims, with all amendments made to claims 11 and 18 in the Amendment After Final submitted March 19, 2010 having been incorporated and those claims now being identified as “(Previously presented),” and dependent claims 22 and 23¹, which were indicated as “(New)” in the Amendment After Final submitted March 19, 2010 now indicated as “(Previously presented)”. A new claim 24 is now presented, which is based on previously-pending claim 1, but including the amendments to claim 1 that were attempted to have been made in the Preliminary Amendment Accompanying Request for Continued Examination electronically filed on March 26, 2010.

In view of the foregoing amendments to the claims and the Remarks submitted on March 26, 2010, Applicant respectfully submits the pending application is in condition for allowance.

It is believed that no additional fees are necessary in connection with the present Amendment, and that the present Amendment is a timely response to the Notice of Non-Compliant Amendment mailed April 2, 2010, because May 2, 2010 fell on a Sunday. However, in the event any fees are necessary in connection with the present Amendment, kindly charge the cost thereof to our Deposit Account No. 13-2855, and please consider this authorization as a constructive petition for extension of time for the appropriate length of time.

//


¹ In the Amendment After Final submitted March 19, 2010, claim 23 was inadvertently identified as claim 24. The numbering of the claim previously identified as claim 24 is now corrected to read “23”. The claim is identified as “(Previously presented)”, as the only change to the claim was the correction of the claim number.

Application No. 10/564,969
Amendment dated May 3, 2010
Reply to Notice of Non-Compliant Amendment mailed April 2, 2010

Docket No.: 27754/26717

Dated: May 3, 2010

Respectfully submitted,

By 

Jeremy R. Kriegel

Registration No.: 39,257
MARSHALL, GERSTEIN & BORUN LLP
233 S. Wacker Drive
6300 Willis Tower
Chicago, Illinois 60606-6357
(312) 474-6300
Attorney for Applicant